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Via FedEx
Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Comment on FINRA's Proposed Amendments to its Expungement Arbitration Rules [Regulatory Notice 17-42]

Dear Ms. Asquith:

While the evolving guidance and rules on FINRA arbitration expungement procedures are based on the well-meaning precepts of investor protection and regulatory value,[1] it is my respectfully submitted opinion that three provisions of the proposed rules are *inequitable and unfairly harsh* to financial advisors and should be reconsidered before FINRA submits the rules to the SEC. In Regulatory Notice 17-42,[2] FINRA states that it "is interested in receiving comments on all aspects of the proposed amendments." Three of the questions posed by FINRA at the end of the Notice deal with procedural provisions I would like to address.

1. Context for Opinions

By way of brief context to my comments, they are based on representing investors, brokers and firms for decades; having the honor of being on FINRA's Arbitration and Mediation Committee for four years; and, being the author of a two volume treatise for attorneys on securities arbitration (published for almost 30 years) and of an annual *Practice Commentary* to the Laws of the State of New York on the subject.

On behalf of my investor clients, I have argued *against* the expungement of their arbitrations from a broker's BrokerCheck Report and as an attorneys for brokers, I have - only where appropriate[3] - argued for the expungement of arbitration Statements of Claim and customer complaints that were denied by brokerage firms and not followed-up with an arbitration.

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[1] See proposed Rule 12805(b)(3)(B).
[2] http://www.finra.org/industry/notices/17-42
[3] See Rule 2080(b)(1) - (A) the claim, allegation or information is factually impossible or clearly erroneous; (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (C) the claim, allegation or information is false.

As a founding member of the Public Investors Arbitration Bar Association (PIABA), I have been critical of my colleagues who, after settling customer cases, offer no opposition to a broker's pursuit of expungement.[4] As a member of the Compliance and Legal Division of the Securities Industry Association (SIFMA), I am sensitive to meritless claims harming a financial advisor's right to earn a living in the pursuit of his or her profession. In any context, it is offensive to be unjustly accused of a wrongdoing and not be able to defend oneself or to be saddled with inequitable and harsh burdens in trying to do so.

In expungement cases, I fully appreciate the shifting of burdens of proof from:

- The customer's obligation to prove that a broker engaged in wrongdoing and that that wrongdoing directly resulted in specific damages to
- The broker's burden that either the claim was impossible or erroneous, that the broker was not involved in the sales practice violation or that the claim was false.

2. Problematic Procedural Provisions

With that context in mind, let me first say that I fully appreciate the overview language of Regulatory Notice 17-42:

> It has been FINRA's long-held position that expungement of customer dispute information is an extraordinary measure, but it may be appropriate in certain circumstances.

Expungement of a customer's arbitration Statement of Claim or a customer's stand-alone complaint that was denied and not followed-up on *should* be an extraordinary remedy, but, in my opinion, three provisions in the proposed rules could very well have the effect of adding the word "very" to the already onerous, though necessary word "extraordinary." They are proposed:

- Rule 12805(b)(1) - hearing session attendance;
- Rule 12805(b)(3) - necessity of unanimous decision; and,
- Rule 13805(3)(E) - one year time limitation for stand-alone complaints that were denied and not followed-up on.[5]

More specifically:

12805. Expungement of Customer Dispute Information under Rule 2080

(b) Deciding a Request for Expungement of Customer Dispute Information

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[4] See *PIABA Law Journal*, "Challenging Expungements After Settlements," Vol. 3, No. 3, 2016).

[5] I have no issue with a one year time limitation following the closure of an arbitration case through other than an Award [proposed Rule 13895(a)(3)(D)] since there is little question that the broker would have been on notice of the customer's complaint.

In order to grant expungement of customer dispute information under Rule 2080, the panel must:

(1) Hold a recorded hearing session **in person or by videoconference** regarding the appropriateness of expungement.

...

(3) **Agree unanimously** to grant expungement ...

13805. Expungement of Customer Dispute Information under Rule 2080 (a) Requesting Expungement of Customer Dispute Information

(3) An associated person may not file a request for expungement of customer dispute information:

....

(E) if there was no investment-related, customer-initiated arbitration involving the customer dispute information, and **more than one year has elapsed** since the date that the customer complaint was initially reported to the Central Registration Depository system.

3. Regulatory Notice 17-42 "Request for Comments"

Among the 12 questions posed by FINRA at the end of Regulatory Notice 17-42 are the following three. Under each of these three questions, I've added FINRA's rationale for the provision.

Question #4 – Unanimous Award Required

Question #4 - What are the costs and benefits of requiring the unanimous consent of a three-person panel to grant all requests for expungement of customer dispute information?

FINRA's Rationale – "The unanimity requirement would apply to all requests for expungement of customer dispute information. Thus, when a panel decides an associated person's expungement request during the Underlying Customer Case, the panel would be required to agree unanimously to grant expungement. In deciding the customer's claims, however, a majority agreement of the panel would continue to be sufficient. The requirement that the decision be unanimous, rather than a majority decision, could also increase the difficulty for an associated person to obtain expungement. To the extent that customers and firms use customer dispute information to make business and employment decisions, if customer dispute information is not expunged as frequently, associated persons could experience a loss of business and professional opportunities, loss of employment at their current firm, and thus, decreased income."

Comment

- While securities arbitration at FINRA (and arbitration in general) is an equitable forum, it is inequitable and harsh to require a broker to prove one of the three grounds for expungement to a *unanimous* panel of arbitrators and only require a *majority vote* for the customer who had alleged misconduct against that broker.

- For as long as I have been involved in securities arbitration,[6] Awards have been based on a majority of the panel for customers and brokers alike, be they claimants or respondents.

- A FINRA expungement arbitration is not a FINRA disciplinary decision, where even there a *majority* of panelists can decide that a broker or firm violated FINRA rules and can be sanctioned. [7] That is, since a unanimous decision is not required in a FINRA regulatory action, it is inequitable and harsh to require such a standard in a FINRA arbitration.

- Even in civil litigation, it is the law of most states that a jury need not come to a unanimous decision in favor of a plaintiff for that party to prevail.[8]

- FINRA is enhancing the quality of expungement panels. In the process, it should show due respect to such arbitrators. If two of the three panelists believe expungement is in order, such a determination should be honored.

Question #5 - One Year Time Limitation

Question #5 - Is the one-year limitation on being able to request expungement of customer dispute information appropriate? Should the time period be longer or shorter?

FINRA's Rationale - is presented in its discussion of customer arbitration cases and then with respect to stand-alone customer complaints. FINRA offers a rationale for the former but is silent for a one year time limit on the latter.

- *Arbitrations* – "With respect to the fourth limitation, if the expungement request is not filed within a year after the Underlying Customer Case closes, the associated person would forfeit his or her right to request expungement. The one-

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[6] In the early 1980s, I was Director of Arbitration of the American Stock Exchange, when arbitration of customer disputes was a voluntary process.

[7] See FINRA Rule 9268(a) – "Decision of Hearing Panel or Extended Hearing Panel," which states that: (a) Majority Decision - Within 60 days after the final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer shall prepare a written decision that reflects the views of the Hearing Panel or, if applicable, the Extended Hearing Panel, as determined by majority vote.

[8] See, McKinney's New York CPLR § 4113, Disagreement by Jury

year limitation period would ensure that the expungement hearing is held close in time to the Underlying Customer Case, when information regarding the Underlying Customer Case is available and in a timeframe that would increase the likelihood for the customer to participate if he or she chooses to do so."

- *Complaints* – "The fifth limitation would establish a one-year period for associated persons to expunge customer dispute information that arose from a customer complaint and did not result in an arbitration claim. Under the proposal, the associated person would have a year from the date that a member firm initially reported a customer complaint to CRD to file an expungement request."

  Note: FINRA does not offer any rationale for imposing a one year time limit for expungement arbitrations following stand-alone customer complaints.

Comment

- I find no fault in imposing a one year time limitation for seeking expungement relief after a customer arbitration closes without an Award (i.e., it settles) since the broker was either a party to the arbitration or had to be aware of it because his/her firm required assistance in defending the claims.

- However, from my experience, brokers can go years before they learn of a stand-alone customer complaint that had been denied by their firm (often their former firm, with which they have no contact) and not followed-up on by the customer.

- Such claims are denied by brokerage firms because it was determined that the claims had no merit. It is unfair to keep meritless claims permanently on a broker's record and overly harsh to prevent brokers from seeking expungement relief of such claims when they learn of them.

- While some argument can be made that the six year eligibility rule[9] could apply to expungement claims as they do for all other claims, reducing them to one year from their denial by the brokerage firm – thus rendering nonarbitrable thousands of stand-alone customer complaints presently on broker records – is punitive in nature and anathema to the cornerstone of securities arbitration as an equitable forum for all parties.

Question #6 - In Person or Videoconference Hearing

Question #6 - Should the associated person who is requesting expungement be required to appear in person or by videoconference, rather than by phone, at the expungement hearing?

[9] See Rule 12206 and Rule 13206.

FINRA's Rationale – "As the associated person is requesting the permanent removal of information from CRD, FINRA believes that the associated person should be available in person or by videoconference to present his or her case and respond to questions from the panel. Associated persons would also be required to attend expungement hearings in person, either by traveling to the hearing location or by videoconference, depending on the method permitted by the arbitration panel. Traveling to the hearing location could significantly increase the cost of having their request heard, by increasing both transportation and room and board costs as well as lost time in transit. Attendance by videoconference would eliminate many of these costs."

Comment

- In person hearings or videoconferencing are much preferred over a teleconferenced hearing, but it may simply not be possible to provide videoconferencing nationwide (or worldwide).

- In addition, since a broker is not seeking financial relief of any kind in an expungement arbitration, the burden of traveling to a remote location to be present at a hearing could very well discourage the broker from bringing a meritorious expungement case.

- I would suggest that the issue of in-person v. video conferenced v. teleconferenced hearings be determined by the arbitrators and not by the administrators (however well-mean they are). Let the enhanced panel of FINRA arbitrators decide what they need to come to a decision in the case.

- I have taken part in many teleconferenced expungement hearings that worked absolutely fine, with arbitrators able to ask all the questions they wanted and have those questioned answered as effectively as if the broker were in the room.

Conclusion

FINRA arbitration has long provided customers, brokers and firms with a full and fair opportunity to be heard, with equity as its cornerstone. My comments seek to preserve FINRA's respected and evolving alternative dispute resolution program.

Respectfully Submitted,